FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 653

ADDIE MAE ROSE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES J. LAUGHLIN
National Press Building
Washington, D. C.

ALBERT J. AHERN, JR.
839 17th Street, N. W.
Washington, D. C.

Counsel for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

ADDIE MAE ROSE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Addie Mae Rose respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on October 13, 1960 affirming the judgment of the United States District Court for the District of Columbia which sentenced the petitioner to imprisonment for a period of 3 to 20 years. Petition for rehearing en banc was denied on November 28, 1960 and the Honorable Justice William O. Douglas extended the time within which to file petition for writ of certiorari to January 18, 1961.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is as yet unreported but is found in the Record at Page 131.

JURISDICTIONAL STATEMENT

This is a final judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the judgment of the United States District Court for the District of Columbia convicting the petitioner of the offense of second degree murder and sentencing her to a term of imprisonment of 3 to 20 years.

QUESTIONS PRESENTED

1. Did not the conduct of the Assistant United States Attorney in his argument to the jury alluding to his identity as a Baptist and discrediting the validity of the Baptist preacher who testified as a character witness for the petitioner by stating that any Baptist minister would do this for a member of his flock violate the pronouncement of this Court in *Berger* v. *United States*, 295 U.S. 78, and deprive the petitioner of due process of law?

2. Was not the petitioner denied due process of law and was not the decision of this Court in *Davis* v. *United States*, 160 U.S. 469, violated when the uncontradicted record showed that the petitioner was of unsound mind at the time of the offense and therefore was it not incumbent upon the trial court to grant a judgment of acquittal by reason of insanity as a matter of law?

STATEMENT OF THE CASE

The petitioner was indicted for second degree murder and brought to trial in the United States District Court for the District of Columbia. The petitioner was a housewife who had for some period of time been receiving anonymous calls from females in the District of Columbia with respect to her husband (R. 34). Testimony showed that the petitioner came upon her husband and his paramour in a car in the District of Columbia and that the shooting occurred at that time (R. 35). When the petitioner was arrested she was taken to the hospital where she was in a hysterical condition, pulled her clothes up and pulled hair out of her head (R. 36). After the Government rested, the petitioner called a psychiatrist, Dr. Michael Miller, who testified with respect to his background as a psychiatrist (R. 43 and 44) and Dr. Miller then proceeded to testify that based on his examination the petitioner, at the time of the offense, was suffering from a temporary mental impairment and that she could not distinguish right from wrong nor adhere to the right (R. 49).

The Government, in rebuttal, called Dr. Gerhard J. Gordon who was given a hypothetical question by the Government upon which he stated he could not express an opinion (R. 103). Dr. Gordon on cross examination admitted all the facts that had been brought out as the basis for the psychiatric findings and conclusions of Dr. Miller (R. 105 to 106). The only other psychiatric evidence which was in the record was a report (R. 61 through 63)—a report from the hospital which indicated that a psychiatric evaluation was made at the D. C. General Hospital after the petitioner had been treated for certain abrasions. At the conclusion of the

petitioner's case a motion for judgment of acquittal was made under the authority of this Court's decision in *Davis* v. *United States*, 160 U.S. 469, and the decision of the United States Court of Appeals for the District of Columbia Circuit in *Douglas* v. *United States*, 99 U.S. App. D.C. 232, 239, F. 2d 52. The motion was denied.

As part of the petitioner's defense a Baptist minister was called who testified as to the petitioner's good character and reputation for truth and veracity. In the closing argument to the jury, the prosecuting attorney identified himself as a Baptist and stated in evaluating the character testimony the minister would have come down to the court for any member of his flock. The case was submitted to the jury. The petitioner was convicted and sentenced as set forth above.

ARGUMENT

I. The conduct of the Assistant United States Attorney in his argument to the jury violated the rule announced by this Court in *Berger* v. *United States*, 295 U.S. 78, and should, by itself, require a new trial.

In his argument to the jury, the Assistant United States Attorney stated as follows (R. 110 and 111):

> "Now, as to character testimony; you weigh that testimony the same as you do any other testimony. Anybody who's going to church can get a—going to a Baptist Church in this city—and I can say it loud because I was born in the Baptist church and I intend to die there, and I mean no reflection on a Baptist church—but she brought her minister here. She paid her dues. He would have come down here for any of his flock—and I don't mean any disrepect for him in that respect because, after all, he is a minister of the gospel and is out to

> save souls and he'll never concede that it's too late. There is always hope to save a soul. So even if a member of his flock strayed from the path, he came down to help her."

In this case the petitioner had called a Baptist minister who had testified as to her good character, and the identification to the jury by the Assistant United States Attorney of his religion and his concomitant statement that any Baptist minister would come down for a member of his flock is unwarranted in the record, is unwarranted in fact and in effect vitiated the testimony which the petitioner had offered as to her good character. In this case the petitioner had no prior criminal record, had been under severe mental strain and it was important to the petitioner that the jury receive the character testimony with full force and vigor and this argument obviated the effect of this character testimony. In *Berger* v. *United States*, 295 U.S. 78, the Supreme Court said:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

"It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. * * * Cook v. Commonwealth, 86 Ky. 663, 7 S.W. 155; Gale v. People, 26 Mich. 157; People v. Wells, 100 Cal. 459, 34 P. 1078."

Due process requires that a defendant be fairly tried and in this case the argument of the Assistant United States Attorney deprived the petitioner of due process of law under the Fifth Amendment and hence this Court should grant the writ of certiorari.

II. The record in this case clearly showed that the petitioner was of unsound mind at the time of the offense and the Government offered no evidence to rebut this fact and therefore under *Davis* v. *United States*, 160 U.S. 469, 16 S. Ct. 353, the trial judge should have directed a judgment of acquittal by reason of insanity.

In support of the petitioner's contention that she was of unsound mind at the time of the offense a psychiatrist, duly qualified, who had examined the petitioner, was called and testified as follows (R. 49):

"By Mr. Laughlin:

Q. Well, and is that a mental illness, a mental disease or a mental impairment?

A. It is a mental impairment, temporary mental impairment.

Q. And is it your testimony that on account of that she could not distinguish right from wrong or if she could distinguish right from wrong, she could not adhere to the right?

A. I felt that she could not act rationally and distinguish right from wrong at that point nor adhere to the right during that state."

The Government, in attempting to satisfy the burden laid down by this Court in *Davis* v. *United States*, supra, called a Dr. Gerhard J. Gordon but an examination of his testimony reveals that he did not rebut the testimony of the petitioner's psychiatrist and stated he was unable to express an opinion (R. 103). The only testimony which could be construed as being offered by the Government and which we feel could not be considered was a report of the hospital which showed that after the petitioner was treated for abrasions a psychiatric evaluation was made by a Dr. D'Agostino who was not called as a witness and this report merely stated:

> "There is no history of previous nervous breakdown or hospitalization for mental disorder. There was no admittance of auditory, visual or tactile hallucinations, no paranoid delusions are elicited. Her speech is coherent. There is no pressure flight of ideas. Affect and thought content are appropriate and adequate under the circumstances."

We say initially that this was a hearsay statement and not admissible but secondarily, even if it were given full weight, it did not rebut nor create a factual issue on the question of the petitioner's sanity and certainly did not satisfy the Government's burden of proving beyond a reasonable doubt that the petitioner was of sound mind at the time of the offense. This Court in the Davis case, quoting with approval Judge Elliott speaking for the supreme court of Indiana, stated:

> "If the evidence is of such a character as to create a reasonable doubt whether the accused was of unsound mind at the time the crime was com-

mitted, he is entitled to a verdict of acquittal. Polk v. State, 19 Ind. 170."

The conviction in this case is predicated on a record which affirmatively shows beyond a reasonable doubt that the petitioner was of unsound mind at the time of the offense. Due process requires that the judgment be set aside.

In view of the above, we ask this Court to grant the petition for writ of certiorari.

JAMES J. LAUGHLIN
National Press Building
Washington, D. C.

ALBERT J. AHERN, JR.
839 – 17th Street, N. W.
Washington, D. C.

Counsel for Petitioner

FILE COPY

Office-Supreme Court, U.S.
FILED
FEB 16 1961
JAMES R. BROWNING, Clerk

No. 659

In the Supreme Court of the United States

OCTOBER TERM, 1960

ADDIE MAE ROSE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

WILLIAM E. FOLEY,
Acting Assistant Attorney General,

BEATRICE ROSENBERG,
THEODORE GEORGE GILINSKY,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

P

Opinion below
Jurisdiction
Questions presented
Statement
1. The crime
2. The evidence on insanity
3. Closing argument by the government
Argument
Conclusion

CITATIONS

Cases:

Berger v. *United States*, 295 U.S. 78
Davis v. *United States*, 160 U.S. 469
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 659

ADDIE MAE ROSE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (R. 131-132) is reported at 283 F. 2d 376.

JURISDICTION

The judgment of the court of appeals was entered on October 13, 1960. A petition for rehearing *en banc* was denied on November 28, 1960. On December 28, 1960, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to January

18, 1961. The petition was filed on January 17, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was entitled to a judgment of acquittal on the ground of temporary insanity.

2. Whether the government's closing argument deprived petitioner of due process.

STATEMENT

Petitioner was convicted of second-degree murder by a jury in the District Court for the District of Columbia and was sentenced to imprisonment for a period of three to twenty years (R. 128). The court of appeals affirmed in a *per curiam* opinion (R. 130-131).

1. *The crime.*—The sufficiency of the evidence of the crime is not here in issue. On September 10, 1959, petitioner who had armed herself with a loaded pistol, went to look for her husband and the deceased, his supposed paramour. Petitioner claimed she had decided to "scare" the deceased (R. 71). Petitioner saw her husband and the deceased in her husband's car. When petitioner reached the car, her husband started the motor and pulled away (R. 12, 80). At that moment the gun discharged (R. 12.) Petitioner fell from the car and was dragged a half block (R. 80). Her husband, who was hit in the shoulder by the bullet, drove the deceased to the hospital (R. 13). Petitioner recovered the pistol from the street (R.

81). She was arrested at the rear of her home and the gun was found between the garbage pail and porch of her home (R. 21-22).

2. *The evidence on insanity.*—The defense presented Dr. Michael M. Miller, psychiatrist, who had examined petitioner for two and a half hours on December 11, 1959 (R. 45).[1] He stated that it was his opinion that on September 10, 1959, petitioner "was in an acute state of emotional agitation" (R. 45). He testified this was "not mental illness, it was a kind of extreme emotional reaction * * *" (R. 49). He was of the view that because of this mental impairment she could not act rationally (R. 49). On cross-examination, the doctor acknowledged he belonged to the school of psychiatry that "would say that people who commit serious crimes are mentally disturbed" (R. 56).

The defense also called Dr. Charles H. Epps, Jr. who had treated petitioner on September 11 and 12 for her physical injuries (R. 60). He read a psychiatric evaluation prepared by Dr. A. D'Agostino, which was in part as follows (R. 62-63):

> There is no history of previous nervous breakdown or hospitalization for mental disorder. There was no admittance of auditory, visual or tactile hallucinations, no paranoid delusions are elicited.
>
> Her speech is coherent. There is no pressure flight of ideas. Affect and thought content are appropriate and adequate under the circumstances.

---

[1] Trial commenced on December 14, 1959 (R. 2).

Impression: Depressed state due to situation of reaction.

In rebuttal, the government called Dr. Gerhard J. Gordon. He stated he could not form an opinion of petitioner's sanity at the time the crime was committed based solely on a hypothetical question encompassing the evidence, but that, if petitioner was confused and could not recall what was going on, she might possibly have been in a state amounting to insanity (R. 103).

3. *Closing argument by the government.* — Petitioner presented two ministers as character witnesses. Both were connected at one time with the Baptist Church (R. 70). Both testified that petitioner's reputation for truth and veracity was very good (R. 69, 70). On cross-examination the government asked one of them (R. 69):

> Q. As a matter of fact, you [would] come down here and testif[y] for any of your flock, wouldn't you?
>
> A. Why, yes, sir, I would do that, yes, sir.

In closing argument, counsel for petitioner claimed that the government "tried to dilute [the character evidence] on cross-examination without success" (R. 109). The government in closing argument stated (R. 110-111):

> Now, as to character testimony; you weigh that testimony the same as you do any other testimony. Anybody who's going to church can get a—going to a Baptist Church in this city—and I can say it loud because I was born in the Baptist church and I intend to die there, and I

mean no reflection on a Baptist church—but she brought her minister here. She paid her dues. He would have come down here for any of his flock—and I don't mean any disrespect for him in that respect because, after all, he is a minister of the gospel and is out to save souls and he'll never concede that it's too late. There is always hope to save a soul. So even if a member of his flock strayed from the path, he came down to help her.

ARGUMENT

1. Petitioner claims (Pet. 6) that she was entitled to a judgment of acquittal on her defense of insanity at the time of the crime. The standard set by this Court in *Davis* v. *United States*, 160 U.S. 469, 488, was that:

> If the whole evidence, including that supplied by the presumption of sanity, does not exclude beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offence charged. * * *

Applying this standard to this case, the record shows that petitioner was not entitled to have a judgment of acquittal directed by the court. As the Court of Appeals for the District of Columbia stated in its *per curiam* opinion (R. 132): "On the testimony here, the issue was properly one for the jury * * *."

The evidence of Dr. Miller who examined petitioner for 2½ hours, 3 months after the crime and a few days before trial, is singularly weak and equivocal.

He stated petitioner was suffering from "a kind of extreme emotional reaction," not from a mental illness; that this emotional condition prevented her from acting rationally (R. 49); and that it was "very difficult to say" whether she could distinguish right from wrong (R. 47). He further testified that he believed that all who commit serious crimes are mentally disturbed (R. 56). Opposed to this there was the psychiatric report of Dr. D'Agostino, made one day after the commission of the crime, which found no evidence of any type of insanity.[2] In addition Dr. Gordon gave his opinion that petitioner might be deemed insane if she was so confused that she could not act rationally or could not recall what had happened. Since petitioner had taken the stand and had clearly related all her movements, there was no lack of recall to support a plea of insanity.

2. Petitioner complains (Pet. 4) of the government's closing argument. The government's statement that a minister would give character testimony "for any member of his flock" was based directly on what the minister had specifically acknowledged on cross-examination. Thus, unlike *Berger* v. *United States*, 295 U.S. 78, this statement was not a substitution of the personal knowledge of the prosecutor for the evidence. Moreover, petitioner's experienced trial counsel apparently considered the remarks as proper since he remained silent and interposed no objection.

---

[2] Petitioner suggests (Pet. 7) that this report was hearsay. This objection is hardly available to him, since the report was introduced by petitioner's own witness and with no objection at the trial.

Petitioner cannot be heard to raise this objection for the first time on appeal. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-239.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

WILLIAM E. FOLEY,
Acting Assistant Attorney General.

BEATRICE ROSENBERG,
THEODORE GEORGE GILINSKY,
Attorneys.

FEBRUARY 1961.

☆ U. S. GOVERNMENT PRINTING OFFICE 1961 983669 695